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No. 06-1183

In the Supreme Court of the United States

SENAIT KIDANE TESFAMICHAEL AND
DAWIT TESSEMA-DAMTE, PETITIONERS

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under the Immigration and Nationality Act's definition of "refugee," an alien is permitted to seek asylum from his country of nationality, or, if the alien is stateless, from the country where the alien "last habitually resided." 8 U.S.C. 1101(a)(42)(A). The Attorney General, however, may not grant asylum to an otherwise eligible refugee if "the alien was firmly resettled in another country prior to arriving in the United States." 8 U.S.C. 1158(b)(2)(A)(vi).

The question presented is:

Whether petitioner Tesfamichael was eligible to seek asylum from Ethiopia once she was found to be firmly resettled in Eritrea.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 469 F.3d 109. The decision of the Board of Immigration Appeals (Pet. App. 35a-39a) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2006. A petition for rehearing was denied on November 27, 2006 (Pet. App. 17a-19a). The petition for a writ of certiorari was filed on February 26, 2007 (Mon-

[1] The immigration judge's decision is not included in the appendix to the petition but can be found in the Administrative Record at 137-173 (A.R.).

day). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. To qualify for asylum, an alien must be a "refugee" as defined in 8 U.S.C. 1101(a)(42)(A). Pet. App. 85a; see 8 C.F.R. 1208.13(b) (listing the asylum eligibility requirements). The Immigration and Nationality Act (INA) defines a refugee as a person who is unable or unwilling to return to his country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). Past persecution can be established by the infliction of a statutorily identified harm on the alien by the government of the country from which the alien is seeking asylum or by forces that that government is unable or unwilling to control. See 8 C.F.R. 1208.13(b)(1). Alternatively, an alien can establish a well-founded fear of future persecution by showing that there is a "reasonable possibility of suffering such persecution" if he returned to that country. 8 C.F.R. 1208.13(b)(2)(i)(B).

The statute permits a "refugee" to seek asylum from the alien's country of nationality,[2] or, if the alien is stateless, from the country where the alien last habitually resided. 8 U.S.C. 1101(a)(42)(A). However, certain exclusions apply. The Attorney General may not grant asylum to an otherwise eligible refugee if "the alien was firmly resettled in another country prior to arriving in the United States." 8 U.S.C. 1158(b)(2)(A)(vi). An alien is considered firmly resettled if he "entered into another

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[2] The term "national" is defined as "a person owing permanent allegiance to a state." 8 U.S.C. 1101(a)(21).

country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement [unless certain exceptions apply]." 8 C.F.R. 208.15; Pet. App. 100a.

2. Petitioner Tesfamichael is ethnically Eritrean and a citizen of Eritrea, though she was born and raised in Ethiopia. Pet. App. 2a; A.R. 138, 470. Tesfamichael became a Eritrean citizen in 1992 when she registered to vote in the Eritrean referendum on independence. Pet. App. 2a-3a & n.2. She lived in Ethiopia until she was deported to Eritrea in June 2000. *Id.* at 2a-3a, 36a.

Shortly after deportations of Eritreans began in June 1998, Tesfamichael and her Ethiopian husband, petitioner Dawit Tessema-Damte, attempted to leave Ethiopia to avoid Tesfamichael's forced deportation to Eritrea. Pet. App. 2a-3a. Their escape plans were foiled when the police stopped their bus and asked the passengers for identification. *Id.* at 3a. Tesfamichael could not produce any, as her Ethiopian identity card was taken from her when she became an Eritrean citizen. *Id.* at 2a-3a. Petitioners were arrested and detained, and Tessema-Damte spent a month in jail for the crime of "smuggling" Eritreans. *Id.* at 3a. After Tessema-Damte's mother secured his release, he obtained Tesfamichael's release one week later by bribing officials. *Ibid.* Fearing reprisal for helping Tesfamichael, Tessera-Damte—without reporting to court on the pending smuggling charges—fled alone to Kenya, then to South Africa, where he lived from 1998 to 2003. *Ibid.*

Ethiopian authorities deported Tesfamichael to Eritrea in June 2000. Pet. App. 3a. In Eritrea, Tesfamichael reunited with her family (who had been previously deported) and worked part-time at a gas station.

Id. at 3a-4a. She was "occasionally taunted or told to go back to Ethiopia." *Id.* at 4a. Tesfamichael claimed that she was denied the full benefits of Eritrean citizenship and an exit visa, and that she feared military conscription. *Ibid.*

In 2002, after Tesfamichael had been living in Eritrea for two years, she was smuggled out of Eritrea and was reunited with Tessema-Damte in South Africa. Pet. App. 4a. The couple lived there for a year until they were victims of a crime, after which they decided to leave. *Ibid.* They entered the United States without visas in March 2004. *Ibid.*

3. In March 2004, the Department of Homeland Security (DHS) initiated removal proceedings, charging petitioners with removability as aliens present in the United States "without being admitted or paroled." 8 U.S.C. 1182(a)(6)(A)(i); Pet. App. 35a-36a. In the course of pleading to her charging document, Tesfamichael admitted all of the allegations, including that she was a citizen of Eritrea. A.R. 138, 470. Petitioners sought asylum, withholding of removal, and protection under the Convention Against Torture (CAT) before the immigration judge. Pet. App. 35a; A.R. 137-173.

On July 15, 2004, the immigration judge denied asylum, withholding of removal, CAT protection, and voluntary departure. Pet. App. 36a. He found that Tesfamichael, by her own admission, was an Eritrean citizen before her deportation from Ethiopia. A.R. 163. The immigration judge further held that, even if her deportation from Ethiopia constituted past persecution, she had been firmly resettled in Eritrea and consequently was ineligible for asylum from Ethiopia. A.R. 163-164; see 8 U.S.C. 1158(b)(2)(A)(vi). He found that she had not suffered past persecution in Eritrea and did not

have a well-founded fear of future persecution there. A.R. 164-166. The immigration judge also found that the two petitioners would not be subject to persecution based on the theory that they might be separated upon return to their respective countries of citizenship. A.R. 166-168.

4. On December 1, 2004, the Board of Immigration Appeals (BIA) affirmed the immigration judge's decision. Pet. App. 35a-39a. The BIA held that Tesfamichael was (1) a citizen of Eritrea, (2) firmly resettled in Eritrea, and (3) unable to show past persecution or a well-founded fear of future persecution if returned to Eritrea. *Id.* at 37a-38a. Specifically, the BIA ruled that the immigration judge's decision was "in conformity with the law" and that the judge "correctly found [Tesfamichael] had firmly resettled in Eritrea." *Id.* at 37a.

5. The court of appeals affirmed. Pet. App. 1a-16a. The court held that "substantial evidence" supported the BIA's decision that Tesfamichael was not a refugee from Ethiopia based on Ethiopia's forced deportation of her to Eritrea. *Id.* at 7a-11a. The court ruled that she failed to meet the definition of a "refugee" under the plain language of the statute. *Ibid.*; see 8 U.S.C. 1101(a)(42)(A); Pet. App. 85a-86a. The court observed that Tesfamichael did not contend that she "is still an Ethiopian national, as she was divested of Ethiopian citizenship," and that the BIA's implicit reliance on her "concession that she is not an Ethiopian national is hard to criticize." *Id.* at 7a-8a. [3]

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[3] The court noted that in her asylum application, Tesfamichael reported Eritrea as her "Present Nationality (Citizenship)." Pet. App. 70a; see *id.* at 7a.

The court also rejected Tesfamichael's contention that she was not firmly resettled in Eritrea based on her claim that, as an Ethiopian deportee, she was not granted the same rights as non-refugee Eritreans. Pet. App. 8a. The court observed that to accept that argument only caused her refugee claim to be analyzed under the "statelessness rubric." *Ibid.* Under that analysis, the court noted that her asylum claim would also be decided with respect to Eritrea because that was the country where she last habitually resided for more than two years. *Ibid.* The court ruled that the facts of Tesfamichael's case belied any notion that Ethiopia was her last habitual residence.[4] Thus, the court concluded that the BIA's determination to use Eritrea as the country from which Tesfamichael could seek asylum was supported by substantial evidence. *Id.* at 10a.

Finally, the court held that substantial evidence supported the BIA's determination that Tesfamichael did not suffer past persecution or have a well-founded fear of future persecution in Eritrea. Pet. App. 10a. The court agreed that the taunts that Tesfamichael experienced in Eritrea did not constitute persecution. *Ibid.*[5]

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[4] The court observed that Tesfamichael's asylum application indicates that she perceived Eritrea to be her country of nationality for purposes of asylum. Pet. App. 9a. The form asked: "Please list your last address where you lived before coming to the U.S. If this is not the country where you fear persecution, also list the last address *in the country where you fear persecution.*" *Ibid.* (emphasis added by the court); *id.* at 73a. Tesfamichael provided addresses in South Africa and Eritrea; she did not include Ethiopia. *Ibid.* When asked if she feared harm if returned to her "home country," she responded by alleging hardships in Eritrea, not Ethiopia. *Id.* at 9a, 74a.

[5] The court of appeals also rejected Tessema-Dante's individual claims and petitioners' spousal separation claim. Pet. App. 11a-16a. Petitioners do not renew those claims in this Court, and Tessema-

ARGUMENT

Petitioners contend that the court of appeals held that, "as a matter of law, an asylum applicant may *never* be a national of, and thus a refugee from, a country that has stripped her of her citizenship," Pet. 3, and that this holding conflicts with decisions of other courts of appeals. Pet. 1, 3-4, 17, 18-22. Those contentions are without merit, and no further review is warranted.

1. a. Contrary to petitioners' contention, the court of appeals did not hold that, "as a matter of law, an asylum applicant may *never* be a national of, and thus a refugee from, a country that has stripped her of her citizenship." Pet. 3; see Pet. 18, 22. The court of appeals concluded that Tesfamichael lost her Ethiopian citizenship as a result of her voting in the referendum on Eritrean independence, Pet. App. 3a & n.2, and thus she did not argue that she is still an Ethiopian national, *id.* at 7a. The court explained that "[r]egistration to vote in the referendum was tied to verification of Eritrean nationality through a detailed form with information about a voter's religious affiliation, parents and grandparents, and references from three Eritrean citizens." *Id.* at 2a. The court's conclusion on the basis of these facts (including Tesfamichael's voluntary participation in the referendum) that Tesfamichael is not properly considered a national of Ethiopia does not state a general rule that an alien "stripped" of her citizenship may *never* be considered a national of the country that took such action.

b. Furthermore, the ruling the court of appeals *did* make is correct. The court of appeals noted that the BIA had "held that [Tesfamichael] was (1) a citizen of

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Dante's claims in this Court are apparently merely derivative of Tesfamichael's claims. See Pet. 4 n.1.

Eritrea, (2) firmly resettled in Eritrea, and (3) unable to show past persecution or a well-founded fear of persecution if returned to Eritrea." Pet. App. 6a. Although petitioner took issue with the BIA's reasoning and urged that she be considered a refugee from Ethiopia, the court concluded that that claim "falters under the facts and the plain language of the statute." *Ibid.*

The law on firm resettlement is well-established. See, *e.g.*, *Cheo* v. *INS*, 162 F.3d 1227, 1229 (9th Cir. 1998) (holding that petitioners were firmly resettled when they fled Laos and lived peacefully in Malaysia for three years before arriving in the United States); *Salazar* v. *Ashcroft*, 359 F.3d 45, 51 (1st Cir. 2004) (deciding that an alien firmly resettled in Venezuela cannot seek asylum from Peru); *Mussie* v. *INS*, 172 F.3d 329, 332 (4th Cir. 1999) (upholding finding that petitioner was firmly resettled in Germany and therefore could not seek asylum as to Ethiopia); *Abdalla* v. *INS*, 43 F.3d 1397, 1399 (10th Cir. 1994) (finding firm resettlement where Sudanese national had lived in the United Arab Emirates for 20 years with a residence visa/permit). The BIA's similar determination on the facts of this case that Tesfamichael had firmly resettled in Eritrea after joining her family and living and working there for two years, Pet. App. 37a—a determination that was not disturbed by the court of appeals, see *id.* at 9a—does not warrant this Court's review.

In the court of appeals, petitioners contended that Tesfamichael could not be regarded as having firmly resettled in Eritrea because she was not granted the same rights there as Eritreans who were not refugees from Ethiopia. As the court of appeals explained, however, that argument would mean at most that Tesfamichael was stateless. In that event, her claim to asy-

lum must be decided with reference to the country where she last habitually resided. Pet App. 8a; see 8 U.S.C. 1101(a)(42)(A). For the same reasons that the BIA had concluded that Tesfamichael had firmly resettled in Eritrea, the court sustained what it termed the BIA's implicit finding that she also last habitually resided in Eritrea. Pet. App. 9a. Once again, that record-based determination does not warrant review by this Court.

Thus, whether Tesfamichael is properly considered to have been an Eritrean national or stateless—and whether she is regarded as having firmly resettled in Eritrea or rather as having last habitually resided there—her asylum claim was correctly considered to be with respect to Eritrea. As the court of appeals explained, any persecution she allegedly experienced in Ethiopia was therefore irrelevant. Pet. App. 7a.

2. Contrary to petitioners' assertions (see Pet. 3-4, 19), the court of appeals' decision does not conflict with the Seventh Circuit's decision in *Haile* v. *Gonzales*, 421 F.3d 493 (2005). In *Haile*, the court considered whether Ethiopia has the sovereign right to strip ethnic Eritreans of their citizenship. 421 F.3d at 494. The court held that it was "arguable" that such actions may constitute persecution by the Ethiopian government but it was "not yet able to say." *Id.* at 496. After acknowledging that the BIA has the primary responsibility for determining what constitutes "persecution," the court remanded to the BIA "for additional factual findings and legal consideration"—including findings on whether the applicants could claim Ethiopian nationality—because there was an undeveloped record and the court was unaware of any BIA precedent on the issue. *Id.* at 496-497.

Contrary to petitioners' claim (Pet. 3-4, 18-19), *Haile* does not stand for the proposition that an asylum applicant who is stripped of his citizenship remains a national of that country for purposes of demonstrating that he is a "refugee" from such country. *Haile* did not resolve that issue. Rather, it deferred the question and remanded the case to the BIA to address the issue in the first instance.

Nor, as explained above, did the court of appeals in this case rule on the question of whether an asylum applicant could ever be a refugee from a country that divested her of her citizenship. Rather, the court below ruled that Tesfamichael's country of nationality for asylum purposes was Eritrea, not Ethiopia, based on the fact that she had firmly resettled in Eritrea and that she contended that she was an Eritrean citizen. Pet. App. 8a-10a. In distinguishing *Haile*, the court of appeals noted (*id.* at 8a n.8) that, unlike Tesfamichael, the applicants in *Haile* were not statutorily foreclosed from claiming Ethiopia as their test country.[6]

Likewise, the decision below does not conflict with *Giday* v. *Gonzales*, 434 F.3d 543 (7th Cir. 2006). See Pet. 4, 19-20. In *Giday*, the asylum applicant was ethnically part-Ethiopian, but was born and raised in Eritrea and had never been to Ethiopia. 434 F.3d at 546-547. As it had in *Haile*, the Seventh Circuit remanded for, *inter alia*, consideration of whether the applicant's "threatened deportation constitutes past persecution." *Id.* at 556. But contrary to petitioners' suggestion (Pet. 20), there was no question as to Giday's country of na-

[6] The *Haile* court did reject the immigration judge's conclusion that one of the applicants had firmly resettled in Eritrea, but the court did so on the ground that the applicant, unlike Tesfamichael, had "never actually been to Eritrea." 421 F.3d at 497.

tionality for purposes of Section 1101(a)(42)(A); it was Eritrea. Therefore, the court did not, nor did it need to, make a "nationality" ruling concerning the country from which Giday could seek asylum. Indeed, in distinguishing *Giday*, the court of appeals here observed that Giday had never been to Ethiopia and thus had no claim to nationality other than Eritrean. Pet. App. 8a n.8.

Nor does *Ouda* v. *INS*, 324 F.3d 445 (6th Cir. 2003), conflict with the decision below. See Pet. 4, 21-22. Ouda was a stateless Palestinian who had left Kuwait for Bulgaria before coming to the United States and seeking asylum. 324 F.3d at 447. As petitioner acknowledges (Pet. 21), because Ouda was a stateless person, the case presented the question of which country, Kuwait or Bulgaria, was the country where Ouda "last habitually resided" for purposes of 8 U.S.C. 1101(a)(42)(A). The court "assume[d]" Ouda was correct that Kuwait was the country where she last habitually resided. 324 F.3d at 450. The court concluded that, because she had suffered past persecution in Kuwait, she was entitled to a presumption of a well-founded fear of future persecution in that country. *Id.* at 454-456. The court of appeals remanded the proceedings to the BIA to afford the government an opportunity to rebut that presumption. *Id.* at 453-456.

In contrast, Tesfamichael admitted that she was a citizen of Eritrea, and therefore is not stateless. Consequently, the correct statutory analysis required a consideration of her country of "nationality" under Section 1101(a)(42)(A), rather than an analysis under the statelessness rubric of where she "last habitually resided." See Pet. App. 8a-9a. In any event, as the court of appeals concluded, Tesfamichael's asylum claim was limited to Eritrea because, even under the last-habitual-

residence test, the test country would again be Eritrea. *Id.* at 8a-9a & n.10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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